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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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| Petition for Expedited               | ) |             |
| Rule Making to Establish Eligibility | ) | RM No. 9328 |
| Requirements for the 2 GHz Mobile    | ) |             |
| Satellite Service                    | ) |             |

**OPPOSITION OF**  
**CONSTELLATION COMMUNICATIONS, INC.**

Constellation Communications, Inc. ("Constellation"), by its attorneys, hereby submits this opposition to the above-referenced Petition for Expedited Rulemaking ("Petition") filed by ICO Services Limited ("ICO").<sup>1</sup> The ICO Petition seeks the initiation of a rulemaking proceeding to establish eligibility requirements for the 2 GHz Mobile Satellite Service ("MSS"). Although Constellation has itself suggested the Commission should initiate a rulemaking concerning the 2 GHZ MSS,<sup>2</sup> Constellation opposes the approach articulated in the ICO Petition and the eligibility requirements proposed in the ICO draft rules.

The ICO Petition asks the FCC to initiate a rulemaking to establish parameters for resolving the pending 2 GHz MSS proceeding. ICO seeks three major rule changes. First, ICO asks the Commission to exclude Big LEO licensees from receiving 2 GHz MSS licenses. Second, ICO requests that the Commission adopt rules to allow conditional licensing of the remaining 2 GHz

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<sup>1</sup> The Commission placed the ICO Petition on public notice on July 28, 1998. *Public Notice*, Report No. 2287 (July 28, 1998).

<sup>2</sup> See Comments of Constellation Communications, Inc. (dated May 4, 1998) and Reply (dated June 18, 1998) in File Nos. 26/27/28-DSS-P/LA-97 *et seq.*

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licensees that satisfy "initial eligibility requirements." Third, ICO seeks a further rulemaking to adopt technical and service rules for the 2 GHz MSS.

The ICO Petition is simply a thinly veiled attempt by ICO to preclude competition for 2 GHz MSS services by excluding the most likely competitors to ICO -- Big LEO licensees. ICO's plans are easy to identify. ICO hopes to exclude its most formidable competitors by imposing unnecessary eligibility requirements and to prematurely obtain rights to the available spectrum through conditional licensing. ICO has failed to establish a legal justification for undertaking these drastic departures from the Commission's regular satellite system processing procedures and offers no evidence that the public interest would be served by amending the Commission's rules in the manner advanced in the Petition. Consequently, the Commission should direct its resources to a more productive endeavor such as structuring a rulemaking along the lines suggested in Constellation's Comments on the 2 GHz MSS applications.

**A. ICO's Request is Premature**

As Constellation has identified in its Comments and Reply in the 2 GHz MSS application proceeding, it would be premature to attempt to restructure the 2 GHz band rules at this point. The Commission must first resolve all outstanding 2 GHz MSS allocation issues in ET Docket No. 95-18 to determine whether the entire 70 MHz allocated to the MSS in the 2 GHz band is available to the proposed systems.

ICO's request to adopt eligibility rules at this time runs contrary to the public interest. The Commission should support the licensing of the greatest number of systems possible in the available spectrum. A determination as to the number of systems which can be accommodated in the spectrum available, however, is necessary before any steps are taken to restrict eligibility. Moreover, the

Commission's recent experience in a number of satellite proceedings has indicated that where the Commission creates an environment conducive to robust discussions, voluntary sharing arrangements can be attained. For example, the first processing round for geostationary fixed satellite service systems in the Ka-band was settled after the Commission actively promoted robust and fruitful discussions.<sup>3</sup> Similarly, the second Little LEO processing round was settled without exclusionary eligibility rules after the Commission created an environment ripe for discussions.<sup>4</sup> Constellation believes initiation of a process that will allow the applicants to develop a technical basis for evaluating the various sharing issues raised by the applicants would be the most productive first step toward resolution of the 2 GHz proceeding. Until attempts are made to resolve this proceeding with less drastic measures, any request to impose eligibility requirements is premature.

**B. ICO Has Failed to Demonstrate a Justification for Eligibility Requirements**

ICO's request to exclude Big LEO licensees from eligibility for 2 GHz MSS licenses relies solely on the Commission's *Notice of Proposed Rulemaking* in the second Little LEO processing round.<sup>5</sup> ICO does not mention in the Petition, however, that the Commission ultimately did not adopt its proposal to exclude incumbent licensees from eligibility in the second Little LEO

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<sup>3</sup> See *In The Matter of Assignment of Orbital Locations to Space Stations in the Ka-Band*, 11 FCC Rcd 13737 (1996) and Letter from GSO Ka-Band applicants to Thomas S. Tycz, Chief, Satellite and Radio communications Division, International Bureau (Feb. 10, 1997).

<sup>4</sup> See Joint Proposal filed by E-Sat, Inc., Final Analysis Communications Services, Inc., Leo One USA Corporation, Orbital Communications Corporation, Orbital Sciences Corporation and Volunteers in Technical Assistance, Inc. in IB Docket No. 96-220, dated Sept. 22, 1997.

<sup>5</sup> *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, 11 FCC Rcd 19841 (1996).

processing round.<sup>6</sup> Moreover, ICO overlooks a number of additional differences which render the Little LEO proceeding inapplicable to the current situation.

First, in the Little LEO proceeding the Commission proposed to exclude existing licensees from obtaining additional spectrum for augmenting their existing systems. Here, the Big LEO licensees ICO seeks to exclude have sought the additional 2 GHz MSS spectrum to launch and operate additional satellite systems offering a new range of services. Second, in the Little LEO proceeding there was an extremely limited amount of available spectrum and intractable mutual exclusivity which had not been resolved despite years of discussions among the Commission and the applicants. In the 2 GHz proceeding, there is a significant amount of spectrum available and the applicants have held no discussions about the possibility of sharing the spectrum.

Third, the Commission's proposal in the Little LEO proceeding was based on an economic analysis that Little LEO services constituted a unique market and that there were insufficient substitutes among other services. ICO provides no similar analysis for the 2 GHz MSS proceeding. Without evidence that there are insufficient means for preserving competition through other existing services, the ICO Petition cannot justify setting aside the 2 GHz spectrum for "new entrants." In fact, if sufficient competition for these mobile telephone services currently exists, taking into account existing and other planned systems, the Commission may determine the public interest is best served by strengthening the Big LEO licensees' ability to compete within other satellite and non-satellite systems through use of the 2 GHz spectrum. ICO's reference to the Little LEO rulemaking proposals cannot justify establishing the rulemaking proposed in the Petition.

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<sup>6</sup> *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, IB Docket No. 96-220, Report and Order (rel. Oct. 15, 1997).

**C. ICO's Premature Construction Cannot Justify Ignoring the Commission's Satellite Policies**

The ICO Petition is further premised on the notion that ICO is the only system which has moved forward to construct satellites and should receive preferential treatment as a consequence. ICO's reliance on pre-licensing construction is directly contrary to the Commission's rules. At the time that it eliminated its prohibition on pre-licensing construction of satellites and its requirement for Section 319(d) waivers, the Commission noted it would not allow applicants to use pre-license construction expenditures to bootstrap into a license.<sup>7</sup> This is exactly the approach ICO is taking in the Petition and which has the potential to undermine the Commission's long standing policies regarding pre-license construction.

ICO's arguments are particularly strained by the fact that the only reason ICO is moving forward with system implementation is because it has already obtained a license from the United Kingdom.<sup>8</sup> ICO appears to be arguing that a foreign-licensed system should be given a preference over domestic systems simply because it has used a foreign license to justify satellite construction. In this case, however, ICO has had an advantage in fund raising over U.S. applicants because it already holds a U.K. license and because of its creation and ownership by Inmarsat signatories. It would be perverse to allow ICO to use the U.S. regulatory process to obtain access to spectrum ahead of domestic competitors simply because it has used a foreign license to justify system construction.

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<sup>7</sup> *Streamlining the Commissions Rules and Regulations for Satellite Application and Licensing Procedures*, 11 FCC Rcd 21581, 21585 (1996) ("Any construction will be at the applicant's own risk, and we will not in any way consider the status of construction or expenditures made when acting on the underlying application.").

<sup>8</sup> ICO Petition at 3.

**D. ICO's Proposal for Conditional Licensing Is Unworkable**

ICO provides no explanation of how the Commission could manage the proposed conditional licensing of 2 GHz applicants. Even if the Commission were to adopt rules excluding Big LEO licensees from 2 GHz MSS eligibility, there is no evidence that mutual exclusivity would be eliminated. Thus, it is unclear how all remaining applicants could be conditionally licensed. Moreover, absent resolution of the spectrum availability questions raised in Constellation's Comments, the Commission will be constrained in its efforts to conditionally license systems. The Commission will need to develop technical and sharing rules for this service before the existing applicants, who propose systems with widely varying technical characteristics, will be able to conditionally implement systems. The Commission should use its resources efficiently to develop the necessary rules of the road for maximizing the number of MSS systems that can be licensed in the 2 GHz band rather than wasting resources on development of interim measures which will promote interference and other problems which will stall the provision of service to the public.

**E. Conclusions**

Constellation continues to support its proposal that a rulemaking proceeding which establishes a regulatory framework to encourage resolution of the 2 GHz proceeding is the correct

approach. ICO's more drastic request is premature and unsupportable. For the foregoing reasons, Constellation Communications, Inc. requests that the Commission deny the ICO Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert A. Mazer", with a horizontal line drawn underneath it.

Robert A. Mazer  
Albert Shuldiner  
Vinson & Elkins L.L.P.  
1455 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 639-6500

Counsel for Constellation Communications, Inc.

Dated: August 27, 1998

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August, 1998, a true and correct copy of the foregoing Opposition of Constellation Communications, Inc. was served by first class mail, postage prepaid, upon the following:

\* Ms. Regina Keeney  
Chief, International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 830  
Washington, D.C. 20554

\* Ms. Fern J. Jarmulnek  
Chief, Satellite &  
Radiocommunication Division  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 520  
Washington, D.C. 20554

\* Ms. Cassandra Thomas  
Deputy Division Chief, Satellite &  
Radiocommunication Division  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 810  
Washington, D.C. 20554

Mr. Bruce D. Jacobs  
Mr. Glenn S. Richards  
Fisher, Wayland, Cooper,  
Leader & Zaragoza L.L.P.  
2001 Pennsylvania Ave., N.W.  
Suite 400  
Washington, D.C. 20006-1851  
Counsel for Personal  
Communications Satellite Corporation

Mr. Gregory C. Staple  
Koteen & Naftalin, L.L.P.  
1150 Connecticut Avenue  
Washington, D.C. 20036  
Counsel for TMI Communications  
and Company, Limited Partnership

\* Mr. Alex Roytblat  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 502  
Washington, D.C. 20554

\* Mr. Harold Ng  
Engineering Advisor, Satellite  
& Radiocommunications Division  
International Bureau  
Federal Communications Commission  
2000 M Street, Room 801  
Washington, D.C. 20554

\* Mr. Thomas S. Tycz  
Division Chief, Satellite &  
Radiocommunication Division  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 520  
Washington, D.C. 20554

Mr. Paul J. Sinderbrand  
Mr. William W. Huber  
Wilkinson, Barker, Knauer  
& Quinn, L.L.P.  
2300 N Street, N.W.  
Washington, D.C. 20037-1128  
Counsel for The Wireless Cable  
Association International, Inc.

Mr. John C. Quale  
Ms. Antoinette Cook Bush  
Skadden, Arps, Slate,  
Meagher & Flom L.L.P.  
1440 New York Avenue, N.W.  
Washington, D.C. 20005-2111  
Counsel for Celsat America, Inc.

\*By Hand Delivery



Ms. Cheryl A. Tritt  
Mr. Charles H. Kennedy  
Ms. Sheryl J. Lincoln  
Morrison & Foerster L.L.P.  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006-1888  
Counsel for ICO Services Limited

Mr. Joseph P. Markoski  
Mr. Herbert E. Marks  
Mr. David A. Nall  
Mr. Bruce A. Olcott  
Squire, Sanders & Dempsey L.L.P.  
1201 Pennsylvania Avenue, N.W.  
P. O. Box 407  
Washington, D.C. 20044-0407  
Counsel for The Boeing Company

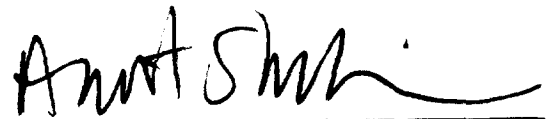
Mr. Warren Grace  
Director General  
Inmarsat  
99 City Road  
London EC1Y 1AX  
United Kingdom

Mr. William Wallace  
Crowell & Moring  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2505  
Counsel for Globalstar, L.P.

Mr. Thomas J. Keller  
Mr. Julian L. Shepard  
Mr. Eric T. Werner  
Verner, Liipfert, Bernhard,  
McPherson, and Hand, Chartered  
901 - 15th Street, N.W., Suite 700  
Washington, D.C. 20005-2301  
Counsel for Iridium L.L.C.

Ms. Jill Abeshouse Stern  
Sr. Vice President and General Counsel  
Mr. Gerald B. Helman  
Vice President, International and  
Governmental Affairs  
Mobile Communications Holdings, Inc.  
Two Lafayette Center  
1133 Twenty-first Street, N.W.  
Washington, D.C. 20036

Mr. Mark A. Grannis  
Harris, Wiltshire & Grannis L.L.P.  
1200 Eighteenth Street, N.W.  
Washington, D.C. 20036  
Counsel for Teledesic LLC

  
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